Robins v. National Trust Co., 1927 A. C. Lord Dunedin at page 520:—

> "Onus is always on a person who asserts a proposition or fact which is not self evident . . . . But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter".

It seems to me that the extracts from the last two cases which I have quoted are particularly and extremely apposite to the position in which the learned Judge found himself and, in effect, resolve the matter.

This, however, does not quite conclude the matter. The learned Judge appears to think that the failure of the Defendant to produce Kasi Chettiar to give evidence has, in effect, weighed down the scales sufficiently to enable him to give a decision in favour of the Plaintiff. Kasi Chettiar was, according to the defence, (paragraph 2), the person who was responsible for the introduction of the Plaintiff to the Defendant and the person who requested the Defendant to give employment to the Plaintiff. Kasi Chettiar was, admittedly, in India at the time of the trial, and I do not think that it can be said that he is proved to have been available. The learned Judge stated "For the purposes of the Defendant, in view of the state of the evidence, Kasi Chettiar appears to me to be the main hinge in the whole of his case. That being so I am entitled to presume, in his absence, that the evidence of Kasi Chettiar would not support the defendant's case but would tend to support that of the plaintiff. The defendant, to put it another way, has not discharged the onus thrown upon him . . . . . "

In the first place there is nothing in the plaint or in any of the prior correspondence which might suggest to the defence that it is Kalamegam the brother of the Plaintiff who is going to prove the terms of the employment, whereas the defence alleges that it is Kasi Chettiar who was responsible for such employment. However mistaken it might have been on tactical grounds not to apply for an adjournment in order to obtain the evidence of Kasi Chettiar, when confronted with that of Kalamegam, I think that the learned judge is in error in stating that, from his absence, he is entitled to presume that his evidence would tend to support that of the Plaintiff (and of course that of his brother Kalamegam). As it is, it appears as if it was this fact that, in the opinion of the learned judge, just sufficiently weighed down the scales in favour of the Plaintiff for him to give judgment in the Plaintiff's favour. In my opinion and with the greatest respect I think that the learned judge was in error in making this presumption as to Kasi Chettiar's absence and also in saying that the defendant had not discharged the onus thrown upon him. In my opinion there was no onus thrown on the defendant, and this onus remained on the Plaintiff to prove the specific terms of his contract, which he failed to do.

For these reasons I think that the appeal should be allowed with costs both here and in the Court below.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., McELWAINE, C.J. (S.S.)

AND GORDON-SMITH, J.

November 23, 1938.

RAMAN CHETTIAR

v.

LEDCHUMANAN CHETTIAR.

(NEGRI SEMBILAN CIVIL APPEAL No. 3 of 1938)

Bankruptcy Enactment (Cap. 55) Ss. 4 (1) (ii), 123—Bankruptcy Rules Nos. 91, 285—Bankruptcy Notice—non-production of office copy of judgment on issue of—claim for judgment debt, costs and interest up to certain date—validity of notice.

A bankruptcy notice founded upon a judgment which ordered payment of $2,971.81 with interest thereon at 5% per annum from a specified date until the date of realisation and costs was issued upon a written request sent by post to the Assistant Registrar of the Supreme Court at Seremban. No office copy of the judgment accompanied the request. The debtor applied to the Court at Seremban to set aside the notice on the ground that the office copy of the judgment was not produced to the Assistant Registrar of the Court when the notice was issued. The learned Judge dismissed the application. The debtor appealed to the Court of Appeal.

Held, by the Court of Appeal (Terrell, Ag. C.J. and Gordon-Smith, J., McElwaine, C.J. (S.S.) dissenting) allowing the appeal that the omission to produce the office copy of the Judgment when the request for issue of the bankruptcy notice was made was a defect which could not be cured by Section 123 of the Bankruptcy Enactment or Rule 91 of the Bankruptcy Rules.

In re Sithamparam Chettiar, (1933—1934) F.M.S.L.R. 332; (1935) 4 M.L.J. 38 not followed.

Held also, that, provided that it claimed the whole of the judgment debt and costs, the notice was not invalid by reason merely of the fact that it required in addition payment of interest at the rate mentioned in the judgment up to a certain date.

In re H. B., (1904) 1 K.B. 94 distinguished.

CIVIL APPEAL.

Joaquim (*Cumarasami* with him) for the appellant.

O'Reilly for the respondent.

Cur Adv. Vult.

Terrell, Ag. C. J.—On the 18th of January 1938, A.K.M.L. Ledchumanan Chettiar the respondent herein obtained a judgment in N. S. Civil Suit 52/37 against P.L.R.M. Raman Chettiar, the appellant, in the following terms:—

> "It is hereby ordered by consent that the defendant do pay to the plaintiff the sum of $2,971.81 with interest thereon at the rate of 5 per cent per annum from the 18th day of January 1938 to the date of realisation of the said sum, and it is further ordered that the defendant do pay to the plaintiff the costs of this suit as taxed by the proper officer of the Court."

On the 28th of February 1938, the respondent signed a request for the issue of a Bankruptcy Notice in the usual form (Form No. 4 Rule 91). Paragraph 3 of the request states "I produce an office copy of a final judgment against P.L.R.M. Raman Chettiar" etc. The request was sent by post, and it is admitted that no office copy of the judgment accompanied the request, but it is alleged in an affidavit sworn by P.R. Annamalai, clerk to the respondent's Solicitors, that by mistake the original decree had been enclosed.

On the 11th of March 1938, the appellant applied by motion to set aside the Bankruptcy Notice on the ground that an office copy of the judgment was not produced to the Assistant Registrar when the Bankruptcy Notice was applied for. On the hearing of the motion a further affidavit was filed by the appellant's Solicitor to the effect that he had been informed by the Assistant Registrar and by the Chief Clerk in the Registry that no copy of the decree, judgment, or order, was produced when the request for the issue of the Bankruptcy Notice was made, and notice was given to cross-examine P.R. Annamalai on his affidavit. Now, the material parts of Rule 91 are as follows:—

> "A creditor desirous that a bankruptcy notice may be issued shall produce to the Registrar an office copy of the judgment on which the notice is founded, and file the notice together with the request for issue which shall be in Form 4 in the appendix with such variations as circumstances may require."

Under section 115 (iii) of the Enactment, the Bankruptcy Rules have the force of law, and there can be little doubt that the Registrar was under a statutory duty not to issue the Bankruptcy Notice until the office copy of the judgment was produced. Accordingly, in the absence of evidence to the contrary, a presumption would arise that such duty had been regularly performed, and the onus would be thrown on to the appellant to satisfy the Court that this duty had not been performed. This issue was, however, never tried, as during the course of the argument on the motion, counsel for the respondent said "I do not propose to prove that the order was produced". Accordingly P.R. Annamalai was not cross-examined on his affidavit, and the argument preceeded on the assumption that the copy of the judgment was *not* produced, counsel for the respondent arguing:—

i. that the object of Rule 91 was merely that the Registrar should be satisfied that the conditions for the issue of the Bankruptcy Notice existed; &

ii. that in any case the non-production of the office copy was an irregularity curable under section 123 of the Enactment.

These arguments were based on the ruling of Mudie J. In *In re S.M.R.M. Sithamparam Chettiar,* 1933/34 F.M.S. Law Reports, p. 332, and were accepted by the learned Judge on the hearing of the motion. Various other grounds were put forward in support of the motion to set aside the Bankruptcy Notice, one of such grounds being that the amount claimed in the notice was not what the debtor had to pay in accordance with the terms of the decree. All those grounds were rejected by the learned Judge, and the application to set aside the Bankruptcy Notice was refused. Against such refusal the debtor has appealed.

On the appeal the appellant relied only on the two grounds referred to above.

Now, it will be seen that Rule 91 does not require the office copy of the judgment to be filed, but only to be produced, and that being so, I have little doubt that the production of the original decree would be a sufficient compliance with the rule. In practice, however, an office copy of the decree or order, usually accompanies the request and is filed. This question does not however arise for decision, as, for the purpose of this appeal, it must be presumed that neither the original decree nor an office copy thereof was produced to the Registrar when the Bankruptcy Notice was issued.

In England it is recognized that bankruptcy is to a certain extent penal in character. The whole procedure is entirely a creature of Statute, and every step that is taken must be capable of being justified either by the express terms of the Statute or by the Rules made thereunder. In cases where a petition is to be founded upon non-compliance with the terms of a bankruptcy notice, it is clear that the serious consequences of bankruptcy depend on the Bankruptcy

Notice by which the proceedings are initiated. For this reason it was laid down by Cave J. in *In re Collier,* 8 Morrell, page 80, as follows:—

> "Due service of a Bankruptcy Notice is necessary in order to constitute an act of bankruptcy, and it is more important that the Rules and Regulations should be properly complied with than in the case of a petition for adjudication."

This passage was approved by the Court of Appeal in *In re O.C.S.* 1904, 2 K.B. page 161, in which Vaughan Williams L.J. said that ever since the decision of *In re Collier,* he had always declined to allow an amendment of a bankruptcy notice except in the case of a merely formal defect. The decision in *In re O.C.S.* is important as the objection in that case was founded on the form of the Bankruptcy Notice and not on a question of service, but it was nevertheless held that the principles of *In re Collier* applied, and that the Statute and Rules must be strictly interpreted. Reference may also be made to the recent case of *"In re a Judgment Debtor",* 53 T.L.R. page 144, in which a question arose as to the substituted service of a bankruptcy notice. At page 147 Slesser L.J. says:—

> "In so far however as Mr. Tindale Davis has argued that some distinction is to be made in favour of the creditor in dealing with the Bankruptcy Rules in contradistinction to the Rules of the Supreme Court, I say that, if any distinction is to be made, it ought to be made in favour of a more rigorous interpretation of the Bankruptcy Rules, which are in their very nature of a penal or a semi-penal character."

Rule 91 specifically provides that the creditor shall produce an office copy of the judgment when he applies for the issue of a bankruptcy notice the production of the office copy is mandatory and not discretionary, and I do not think that it is for the Courts to speculate why this provision was introduced when it is perfectly clear in its terms and admits of only one construction. I regret, therefore, that I cannot agree with the ruling of Mudie J. in *In re Sithamparam,* which was accepted by the learned Judge in the Court below to the effect that it is only necessary for the Registrar to be satisfied that the conditions requisite for the issue of the notice obtain, and that if he is so satisfied, the production of the office copy of the judgment is superfluous. It may be that the decision of Mudie J. can be distinguished on the ground that in the case before him a previous bankruptcy notice had been issued, upon the request for which an office copy of the judgment had been produced, but I cannot accept the general proposition that a provision which is in its terms mandatory can be disregarded in a procedure which is penal in its nature. For the same reasons I do not think that section 123 of the Enactment or Rule 285 (non-compliance) can be invoked. The jurisdiction to issue the Bankruptcy Notice is entirely dependent on the strict compliance with the terms of Rule 91, and to disregard such terms is not a mere formal defect or irregularity which can be cured. In my opinion, therefore, the defect is fatal.

I will now deal shortly with the other objection raised by Mr. Joaquim. The objection is that the Bankruptcy Notice which was issued on the 1st of March 1938 only asked for payment of the amount of the judgment and costs and interest up to the 18th of February 1938, and it is argued that this is fatal as the debtor is not required "to pay the judgment debt in accordance with the terms of the decree" within the meaning of section 4 (1) (i) of of the Enactment. It is conceded that if the notice had required payment of something in excess of the sum actually due upon the judgment, that would have been a fatal defect, but no case was cited in which objection was taken to a notice claiming part only of the interest due, or even to a notice claiming no interest at all. The case of *In re H.B.* 1904, 1 K.B. page 94, is not really in point except for a dictum of Romer L.J. which was not necessary for the decision. In that case the payment of the judgment debt had been varied by an express agreement providing for the payment of the debt by instalments. The Bankruptcy Notice was founded on three of the instalments which were overdue. Accordingly the debtor was not asked to pay the sum claimed in accordance with the terms of the judgment, but in terms of the judgment as varied by an agreement. This was held not to be within the terms of the section and to constitute a fatal defect.

The passage relied on in the judgment of Romer L.J. at page 103 is as follows:—

> "Clearly in a bankruptcy notice the debtor is entitled to see from the notice exactly what is claimed to be due on the judgment. No doubt a sum might be claimed which is less than the real amount due, and that would not of course be fatal to the notice so long as the notice made it clear that nothing more was claimed to be due on the judgment beyond the amount specified in the notice. But a notice to pay part of a judgment debt, leaving any balance that may be due to be subsequently claimed, is, to my mind, clearly bad."

Now, I think that in this passage the learned Judge has in mind the principal amount of the judgment debt itself and not the interest on the judgment. In England every judgment by Statute carries interest at 4 per cent, but the fact that interest is payable is not referred to in the judgment itself. In the

Federated Malay States the practice is different, as the rate of interest is in the discretion of the Court provided that it does not exceed 8 per cent (section 226 of the Civil Procedure Code), and the rate of interest is accordingly mentioned (see Civil Procedure Code Form 125). In the present case the creditor is not dividing up his judgment debt by claiming part only, as was the position in *In re H.B.*, 1904, 1 K. B. page 94, where the creditor clearly intended to claim the remainder of the judgment debt on a subsequent occasion. In the case now before the Court the creditor has claim the whole of the judgment debt and costs, and if he claims part only of his interest or no interest at all, I cannot see that the debtor is prejudiced in any way. It may well be that a claim for interest only up to a certain date is a waiver of subsequent interest provided that the terms of the Bankruptcy Notice was complied with. The case of *In re Lehmann*, 7 Morrell, page 181 is an authority for the proposition that in England the Bankruptcy Notice is not bad if interest at the statutory rate is addad to the judgment debt. The judgment of Cave J. is as follows:—

> "I think you are entitled to have a bankruptcy notice issued for the amount due on the judgment which includes the interest. There might be a question whether the two amounts should not appear separately in the notice—namely, first the judgment and then the interest—or whether it should be in the form in which it has been put, but that is a mere matter of detail. The creditor is entitled to have the amount of the interest added to the judgment debt so that the debtor may be informed by the notice that he cannot comply with the notice without paying the interest on the debt."

It would appear to follow from this judgment that the Bankruptcy Notice would have been good if no interest had been claimed at all and I can see no distinction between a judgment in the Federated Malay States where the rate of interest is specifically mentioned and a judgment in England where interest at a fixed rate is implied by law.

For these reasons I do not think that the objection to the form of the Bankruptcy Notice can be sustained. In view, however, of my finding on the other objection I would allow the appeal and direct that the Bankruptcy Notice be set aside. The appellant will be entitled to his costs here and below. The deposit will be paid out to the appellant or his Solicitor.

McElwaine, C.J., S.S.—This appeal against the rejection of a motion to set aside a Bankruptcy notice is based upon two grounds:—

(1) that an office copy of the judgment on which the bankruptcy notice was founded was not produced to the Registrar with the request to issue the bankruptcy notice as required by Bankruptcy Rule 91.

(2) that the notice was bad in as much as it demanded the amount of the judgment and costs and interest on the judgment at 5% from 18.1.38 (the date of the judgment) to 17.2.38 instead of from 18.1.38 "to the date of realisation of the said sum", the words used in the Order.

A clerk in the employ of the solicitors for the plaintiff swore an affidavit in which he said that when filing the bankruptcy notice the solicitors did produce to the assistant Registrar an original copy of the order dated 18th January, 1938, on which the bankruptcy notice was issued and he exhibited the solicitor's letter to the assistant Registrar which read:—

> "We beg to enclose two copies of bankruptcy notice and Request for issue, for service on the above named defendant together with certified copy of decree and praecipe form stamped $6.50."

The affidavit explained that "certified copy of decree" was a mistake and that the original order was enclosed in the letter which was typed by the deponent who himself "placed the enclosures thereto with the said letter".

I note that it is not stated that the letter and enclosures were placed in an envelope, nor is it stated in what manner the application reached the assistant registrar.

The solicitor for the debtor filed an affidavit:—

> "On enquiry I have been informed by the assistant Registrar and by the Chief Clerk of the Registry of this Honourable Court that no copy of decree, judgment or order on which was founded the request for the issue of the bankruptcy notice hereon was produced when the request was made."

The solicitor for the debtor also served notice that he desired to cross-examine the clerk of the plaintiff's solicitor on his affidavit.

On the hearing of the motion counsel for the debtor alleged that the copy of the formal judgment was not produced. He is not recorded as having referred to his affidavit setting out what the assistant Registrar told him, nor it is recorded that he asked for the clerk to be produced for cross-examination. On the other hand, counsel for the plaintiff is recorded as having commenced his argument on this ground as follows:—

> "Even if not produced at all only formal defect. I rely on section 123 Bankruptcy Enactment and 1933—4 F.M.S.L.R. 332. I do not propose to prove that the order was produced. Rule 91 meant for guidance of Registrar."

I can only take this to mean that the plaintiff was not relying upon the clerk's affidavit and that he was not disposed to deny that the hearsay in the debtor's solicitor's affidavit was true, and I think it clear that the case proceeded on the assumption that the copy of the judgment was in fact not produced to the assistant Registrar with the application for the issue of the bankruptcy notice.

The argument was that so long as the bankruptcy notice in fact accords with the judgment the non production of the office copy to the Registrar is an irregularity which the Court may disregard if it is of opinion that the irregularity can have caused no injustice. Bankruptcy Enactment section 123, Bankruptcy Rule 285.

The learned judge in the Court below relied on *In re S.M.R.M. Sithamparam Chettiar* 1933—4 F.M.S.L.R. 332 in which Mudie J. said:—

> "The object of the rule is that the Registrar may be satisfied that the conditions requisite for the issue of a bankruptcy notice obtain."

Mr. Joaquim argued that production of the copy of the judgment is essential to the Registrar's jurisdiction to issue the bankruptcy notice.

It will be observed however that Rule 91 which requires the creditor to file the notice together with the request for issue, does not require that the office copy of the judgment should be filed. The office copy of the judgment is therefore no part of the record, and if this part of Rule 91 has not been complied with, the debtor can only become aware of the defect by some accidental discovery and not by search. This fact to my mind greatly diminishes the importance to be attached to the production of the copy.

It appears to me that the purpose of this part of Rule 91 is to provide evidence in a simple form which will enable the Registrar to satisfy himself of the correctness of the notice. If the Registrar is otherwise satisfied and if the notice is in fact correct, the shewing to him of a copy of the judgment is not essential. The judgment may have been entered through that registry (as was the case in the present proceedings). The Registrar might remember the case or he might refer to the case file and satisfy himself in that way. If the notice itself is in any way inaccurate or defective, the notice may be set aside. It is scrutinised much more closely than a petition. *Re Collier* 64 L.T.R. 742.

We were referred to *In re O.C.S.* (1904) 2 K.B. 161, but in that case the bankruptcy notice was bad because its foundation was bad, the foundation being two separate judgments. It had already been decided in *In re Low* (1891) 1 Q.B. 147 that under section 4 (1) (g) of the Act of 1883 (corresponding to section 4 (1) (i) of the F.M.S. Bankruptcy Enactment) a bankruptcy notice can be founded on one judgment only. The notice itself was bad on its face.

The notice too would be bad if the requisition filed shewd that an unauthorised person had asked for it to be issued, but that is a very different irregularity to the issue of a correct notice on evidence other than that laid down in the Rule, non compliance with which could only be discovered by accident and which could probably only be proved if the registrar had so few cases that he could recollect the circumstances under which a particular notice had been issued.

Failure to file the request for issue would be fatal as the debtor is entitled to know from the record that the proceedings are being taken by a proper person. The fact that no provision is made requiring the copy of the judgment to be filed indicates that the production of the judgment is not a matter of vital importance. The debtor is amply protected because if the notice is not in accordance with the judgment the notice will be declared bad.

In my opinion the irregularity is not such as to deprive the debtor of any right or to prejudice him in any way and it may be, and should be, excused under Rule 285 just as the defect in *In re Johnson* 25 Ch. D. 112 was excused under the English section corresponding to section 123 of the Bankruptcy Enactment.

The second point in the appeal was that the notice did not accord with the judgment in that the latter gave interest at 5% from 18th January, 1938, until realisation while the notice only claimed one month's interest from 18th January.

If the exact amount of interest must be set out in a bankruptcy notice, it is difficult to see how a bankruptcy notice can be accurate as it is impossible to calculate interest to an unascertained date.

In *In re Lehmann* 7 Morrell 181 (62 L.T.R., 941) the notice claimed £14,896. Of this sum £13,796 was the judgment and £1,100 was added as interest at 4%. It was held that the interest was properly added although interest was not mentioned in the judgment but was payable on the judgment by reason of 1.2 Vic. ch. 110 section 17.

Rule 90 says that a bankruptcy notice shall be in form No. 5 in the Appendix with such variations as circumstances may require, and if the interest had been calculated to the date of issue of the bankruptcy notice, the notice would have shewn the amount due on that day and it could not have been suggested that the notice was misleading.

But the notice while setting out the sum of $3421.81 as the sum claimed by a creditor "as being the amount due on a final judgment" also sets out how the sum is arrived at:—

Amount of Judgment	$2971.81
Costs of Judgment	437.62
Interest on $2971.81 @ 5% from 18.1.38 to 17.2.38	12.38
	$3421.81

The only point is that interest was calculated for one month instead of to 1st March, 1938, the date of the bankruptcy notice and can it be said from the notice the debtor knew exactly what is due by him? As Romer L.J. said in *In re H.B.* (1904) 1 K.B., 94 at 103:—

> "In a bankruptcy notice the debtor is entitled to see from the notice exactly what is claimed to be due on the judgment debt."

The Enactment contains no section exactly corresponding to section 2 of the English Act which states that a bankruptcy notice "shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order."

The Enactment does say that the notice shall be in the prescribed form and the present notice is in the prescribed form: it claims a sum as the amount due on the judgment.

By section 4 (1) (i) a debtor commits an act of bankruptcy if he has been served with a bankruptcy notice "requiring him to pay the judgment debt in accordance with the terms of the decree" etc. and if he does not comply with the notice.

From this it is clear that the amount claimed as being the amount due on a final judgment means the exact amount due on the judgment. But in arriving at this amount credit may be given for any payment on account—per Vaugham Williams L.J. in *In re H.B.* (1904) 1 K.B. at 105. The reason for this is because the judgment having been in part satisfied the full amount is not due but the balance remains due under the judgment.

I see no reason why a debtor should not be released of part of his debt by his creditor and that I take to be the effect of the notice in this case. The debtor has been excused $6 or $7 interest.

Indeed, I see no reason why the notice should be bad if it omitted to claim interest at all, and I infer from *Lehmann's case* that a notice claiming £13,796 would have been good though an Act of Parliament added 4% interest to that sum. In that case the Registrar was prepared to issue the notice for £13,796, that is, the amount exclusive of interest and I see nothing in the case to indicate that this would have been a bad notice. The case decided that the creditor was entitled to add the interest.

It is immaterial whether the interest is payable by virtue of a statute or by virtue of the judge's order made under section 226 of the Civil Procedure Code.

Mr. O'Reilly for the creditor made it clear that further interest is waived. This distinguishes the case from *In re H.B.* (1904) 1 K.B., 94 in which it was clear that there was no waiver of the balance of the amount due under the judgment but not claimed in the bankruptcy notice.

Did the debtor see from the notice exactly that was claimed to be due? Undoubtedly, he did see what was claimed though in fact more was due.

The creditor was claiming less than the sum to which he was entitled and the notice combined with his counsel's statement constitute a waiver of the few dollars extra interest which might have been claimed. If the debtor is adjudicated in respect of the act of bankruptcy occasioned by non compliance with the bankruptcy notice, further bankruptcy proceedings arising from the judgment will be barred unless the adjudication is set aside on account of any illegality.

In my opinion the notice is not bad and I would dismiss the appeal.

Gordon-Smith, J.—This is an appeal from a decision of Raja Musa, Acting Judge at Seremban, dismissing a motion to set aside a Bankruptcy Motion which had been issued by the Respondent—Creditor against and served on the Appellant—Debtor.

On the hearing of the motion various grounds were put forward in support of the application to set

aside the notice, but we are now only concerned with two of such grounds, namely—

(a) That a copy of the Judgment, Decree or Order not having been produced to the Assistant Registrar in compliance with Bankruptcy Rule 91, the Bankruptcy Notice should not have been issued and the same was bad;

(b) That the Bankruptcy Notice is bad, inasmuch as it was not a demand for a sum in accordance with the terms of the Judgment.

As regards (a) the learned trial Judge stated that this point was in dispute and then sets out the evidence given by affidavits for both side. At the hearing Mr. Rintoul is recorded as having said "Even if not produced at all, only formal defect. I rely on S. 123 of the Bankruptcy Enactment and 1933-34 F.M.S. 332. I do not propose to prove that the order was produced".

The learned trial Judge did not find as a fact whether or not the order was produced but proceeded on the assumption that this was not done. This Court can only do likewise, and the arguments addressed to us were on this basis.

It was submitted to us by counsel for the Appellant that the provisions of the Bankruptcy Enactment and Rules thereunder are of a penal nature. I agree that, in many respects, this is so as is borne out by the words of Slesser L.J. in *In re a Judgment Debtor,* T.L.R. Vol. 53 at page 147 in reference to the argument that some distinction is to be made in favour of a creditor in dealing with the Bankruptcy Rules in contra-distinction to the Rules of the Supreme Court. Slesser L.J. said:

> "that if any distinction is to be made, it ought to be made in favour of a more rigorous interpretation of the Bankruptcy Rules, which are in their very nature of a penal or semi penal character."

Rule 285 reads:

> "Non-compliance with any of these rules or with any rule of practice for the time in force shall not render any proceedings void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

Assuming as was done in the Court below and as is done in this Court, that Rule 91 of the Rules was not complied with, in that an office copy of the judgment was not produced when the request for issue of a Bankruptcy Notice was filed, we are asked to say that this defect can and should be cured by the Court under Rule 285.

In support of this submission *In re O.C.S. (a Debtor)* 1904 2 K.B. 161 was quoted to the learned Judge below, but he has in his judgment misquoted the report. The statement he attributed to Vaughan Williams L.J. that "there may be special cases in which the general rule should not be applied" was made by counsel at the conclusion of the Lord Justice's remarks in quoting Cave J. in *In re Collier* as follows "Due service of a Bankruptcy Notice is necessary in order to constitute an act of bankruptcy, and it is more important that the rules and regulations should be properly complied with than in the case of petition for adjudication. When the act of bankruptcy has been committed then the petition is a less formal matter and one as to which it is not necessary to take exactly the same view. Very soon after the Act of 1883 came into operation several cases were brought before the Court with reference to a Bankruptcy Notice and on more than one occasion the Court of Appeal expressed the opinion that, since the commitment of an act of Bankruptcy was a serious matter and involved consequences of what has been called a penal nature, it was important to see that the necessary preliminaries were complied with". The other Lord Justices all concurred in holding that the objection was fatal to the proceedings, the irregularity being that the Bankruptcy Notice included two judgments, each of which was for an amount within the Bankruptcy jurisdiction.

The learned Judge also felt himself bound by the decision of Mudie, J. in *In re S.M.R.M. Sithamparam Chettiar,* F.M.S.L.R. 1933-34 p. 332. In that case, as in this case, a notice was issued without production of an office copy of the judgment but an earlier notice had been issued upon such production but had been set aside on the ground that the amount stated to be due in the notice was incorrect and a fresh notice was then issued without such production. It may be, as stated by Mudie, J., that the object of the rule is that the Registrar may be satisfied that the conditions requisite for the issue of a notice obtain, but the rule lays down specifically what are the conditions precedent to the issue, in other words, what procedure is to be adopted in order to so satisfy the Registrar, and in my opinion if such conditions are not strictly complied with it is not competent for a Court to say that the Registrar may be satisfied by any other means or that he has any discretion in the matter. If such had been intended then the Rule would have said so. I am therefore of the opinion that such a defect is not a

formal defect which can be cured by the Court either under section 123 of the Enactment or under Rule 285. The Appellant therefore succeeds on this ground.

I can deal briefly with the Appellant's second ground of appeal. It is difficult to see how the notice could have been framed more in accordance with the terms of the judgment and at the same time notify the Debtor as to the exact amount claimed. The total amount claimed is set out in the body of the notice and in the margin details are given showing how this total is made up. These details are $2,971.81 which was the specific amount awarded in the judgment, then $437.62 in respect of taxed costs which were also awarded to the Plaintiff but which had of course to be taxed subsequently to the judgment, and then $12.38 in respect of interest which was also awarded in the judgment at a rate of 5 per cent "to the date of realisation of the said sum". Neither the judgment—Creditor, nor anyone else could give the exact date of such realization in anticipation of the Judgment—Creditor computed interest at such rate up to the last completed month prior to the date of issue of the notice.

I do not think that *In re H.B.* (1904) 1 K.B. 94 can be urged as an authority for the Respondent as the facts in that case were so entirely different to those in the case before us. In fact Vaughan Williams L.J. added a statement to his judgment that a Bankruptcy Notice issued for a smaller sum than the judgment by reason of credit being given for amounts already paid is a notice to pay in accordance with the terms of the judgment.

It is obvious, in my opinion, that in computing the amount of interest due on the judgment the judgment—creditor has waived the few dollars payable in respect of the 14 days prior to the date of the issue of the notice. In any case, he could not give the debtor credit for the specific amount of interest which was or would become payable until realization.

For these reasons I am of the opinion that on this ground the notice was in accordance with the terms of the judgment, but that on the first ground the Appellant succeeds with costs both in this Court and the Court below.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

November 23, 1938.

PUBLIC PROSECUTOR v. CHEAN TIN

(PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 5 of 1938)

Criminal Procedure—Summary Trial—Procedure upon plea of guilty being made.

It is the duty of Magistrates, where an accused has pleaded guilty, to record some evidence upon which the sentence may be based and upon which, on appeal, the adequacy or otherwise of such sentence can be reviewed.

MAGISTRATE'S CRIMINAL APPEAL.

Draper, Deputy Public Prosecutor, for Public Prosecutor, Appellant.

Respondent in person.

Terrell, Ag. C. J.—The accused was charged with two offences, the first under S.13 (i) of Cap. 133 —(Excise Enactment), and the other under S.62 (a) of the same Enactment. He pleaded guilty to both charges, and was fined $5 or one day's R. I. on the first charge, and 60 or 14 days R. I. on the second charge. The Public Prosecutor has appealed against the inadequacy of the sentences.

I would remark that it is the duty of Magistrates, even where the accused has pleaded guilty, to record some evidence upon which the sentences are based, and upon which, on appeal, the adequacy or otherwise of such sentences can be reviewed. In this case the learned Magistrate made no record at all, and it was accordingly necessary for the Supreme Court to call evidence under S.317 (i) of the Criminal Procedure Code. It now appears that the accused had previously been convicted and sentenced for a similar offence, the previous conviction being admitted by the accused.

In the circumstances it appears to the Court that the sentence on the first charge was inadequate, and the appeal was allowed and the sentence altered to one of two months R.I., such sentence to run from the date of conviction, namely the 13th of October 1938. The Deputy Public Prosecutor did not proceed with the appeal against the sentence on the 2nd charge, and this sentence was accordingly confirmed.

Sentence Enhanced.